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# Supreme Court of the United States

JUDY BOEKEN, AS TRUSTEE, ETC.,

*Petitioner,*

*v.*

PHILIP MORRIS INCORPORATED,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEAL OF  
THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

## PETITION FOR A WRIT OF CERTIORARI

MICHAEL J. PUIZE  
LAW OFFICES OF MICHAEL J. PUIZE  
11755 Wilshire Blvd., Suite 1170  
Los Angeles, CA 90025  
(310) 312-1102

KENNETH CHESEBRO  
*Counsel of Record*  
P.O. Box 381070  
Cambridge, MA 02238-1070  
(617) 661-4423

*Counsel for Petitioner*

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BATEMAN & SLADE, INC.

BOSTON, MASSACHUSETTS

## **QUESTIONS PRESENTED**

1. Whether the Due Process Clause of the Fourteenth Amendment enacts a presumption that punitive damages awards may not exceed a single-digit multiple of compensatory damages, a presumption applicable even in cases involving extremely reprehensible misconduct where the use of a single-digit cap would severely undermine the deterrent function of punitive damages.

2. Whether a court deciding if a particular punitive damages award violates federal substantive due process is required to consider evidence concerning the illicit profit, or lack thereof, received by the defendant through the misconduct which injured the plaintiff.

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## **PETITION FOR A WRIT OF CERTIORARI**

Judy Boeken respectfully petitions this Court for a writ of certiorari to review the judgment of the Court of Appeal of the State of California, Second Appellate District, in this case.

### **OPINIONS BELOW**

The court of appeal's decision from which review is sought (App. 2a-75a) is reported at 127 Cal.App.4th 1640. The court of appeal's earlier opinion, rendered prior to rehearing (App. 76a-147a), is unreported. The trial court decision reviewed by the court of appeal (App. 148a-174a) is unreported.

### **JURISDICTION**

The decision of the court of appeal was entered on April 1, 2005. Boeken's timely petition for review was denied by the California Supreme Court on August 10, 2005. App. 1a. This Court's jurisdiction is invoked under 28 U.S.C. § 1257.

### **CONSTITUTIONAL PROVISION INVOLVED**

The Due Process Clause of the Fourteenth Amendment provides in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

### **STATEMENT OF THE CASE**

This case presents issues significant to the administration of punitive damages throughout the nation, particularly in cases involving a profit-motivated official corporate policy to inflict intentional torts on consumers. A central function of punitive damages has long been the deterrence of deliberate wrongdoing. That deterrent function has been put in jeopardy by a flawed

reading of this Court's past punitive damages decisions embraced by the court of appeal below and other lower courts, which employ an arbitrarily truncated substantive due process analysis to reduce punitive damages awards far below the level necessary for effective deterrence. This misreading of this Court's precedents poses a serious threat to the ability of the States to deter intentional wrongs against their citizens, and the ability of honest businesses to maintain their standards in competition with less honest businesses that will defraud and otherwise victimize consumers if no effective punitive damages deterrent is in place.

The Due Process Clause of the Fourteenth Amendment provides no warrant for this invasion of the power of the States to protect their citizens from intentional torts. Here, the jury awarded an amount of punitive damages which removed only a fraction of the defendant's illicit profits from a decades-long fraud policy which resulted in the death of petitioner's decedent, Richard Boeken. Yet the court of appeal slashed the award by 98% so that it would bear a 9-to-1 ratio to the compensatory damages. This case is an ideal vehicle for correcting a fundamental misreading of this Court's precedents in the area of punitive damages, and thereby ensuring that federal due process is not used to displace an important aspect of the States' police powers.

#### **A. Statement of Facts**

##### **1. Richard Boeken's Addiction and Death Linked to Marlboro Cigarettes**

In 1957 at age 13, Richard Boeken began smoking Marlboro cigarettes manufactured by Philip Morris, enticed by its advertising campaign targeting young boys. See pp. 12-15, *infra*. Boeken quickly became addicted, smoking two packs of Marlboros a day for decades.



RT 1980-81.<sup>1</sup> Starting in 1967 Boeken made numerous efforts to quit. Due to his heavy addiction and the influence of repeated denials by Philip Morris and the other tobacco companies of allegations that smoking was dangerous, Boeken was unable to quit smoking. RT 1976-91, 1991-96, 2004-05, 2321-26, 3327-32; CT 13558-59. In 1999 Boeken was diagnosed with lung cancer which was indisputably caused by the Marlboro cigarettes, and he filed this lawsuit. CT 1-66. Boeken died on January 16, 2002, at age 57.

## **2. The Scientific Proof by 1954 That Cigarette Smoking Causes Lung Cancer**

Lung cancer was rare before 1950. RT 1323-25, 1336-38, 1353-56, 2067-74, 5200, 5220. Before 1950 there was no "serious concern," even in the medical and scientific community, "that cigarette smoking might be a cause of lung cancer." RT 5193.

Between 1950 and 1954, epidemiological studies were published in leading medical journals indicating that cigarette smoking causes lung cancer. RT 2082-87; *see also* RT 1325-31, 1334-39, 1338-42, 1348-49, 1355-59, 1363, 5213-17, 5220. One study specifically concluded "that cigarette smoking was an important cause of lung cancer." RT 1335, 1357-58.

In 1953 the *New England Journal of Medicine* observed that "the evidence of an association between cigarette smoking and lung cancer [is] so strong that it represent[s] proof of causation, proof as people normally use the word" — that is, "[p]roof within the every day meaning of the word," obligating doctors to take action to

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<sup>1</sup> "RT" denotes references to the Reporter's Transcript (the trial transcript). "CT" denotes references to the Clerk's Transcript (other filings in the case). Boeken stands ready to lodge with the Clerk, on request, a complete copy of the Reporter's Transcript and Clerk's Transcript on CD-ROM in PDF format, should the Court wish to review the record in evaluating this petition. In paper format, this material fills over a dozen banker's boxes.



protect their patients. RT 2091-93, 2120. The data cited in the *New England Journal of Medicine* editorial "could not be refuted and [were] never refuted," and "there is no question at all that the issue was proven by 1953." RT 2120-21. See also RT 2088. Within several years a worldwide scientific consensus that cigarettes are the principal cause of lung cancer was reached, once other scientists reviewed and corroborated the 1953 data. *E.g.*, RT 1347-51, 2087-91, 2094-2108, 2012, 2120; RT 1360-61, 1372-77. See also App. 150a-154a.

The scientific proof that cigarettes are an important cause of lung cancer has remained undisturbed since 1953. The average smoker has a risk of lung cancer 20 times that of a nonsmoker; the risk is higher in heavier smokers. RT 1410. About 100,000 Americans die each year from lung cancer caused by cigarette smoking. RT 2278-79. Another 300,000 die each year from other diseases caused by cigarette smoking, principally coronary artery disease and emphysema. *Id.*; RT 1993. Cigarette smoking is "the single most important cause of death in cigarette smokers in developed countries." RT 1412. It kills half of all smokers, shortening their lives by an average of seven years. RT 1995.

### **3. Nicotine, an Addictive Drug**

Cigarettes contain nicotine, a highly addictive drug. RT 1906. By flooding a smoker's brain with artificially high levels of neurotransmitters, nicotine triggers powerful and permanent changes in the structure and function of the brain, affecting mood, cognitive abilities, and behavior. RT 1906-10, 1917-21, 1927-30. Most smokers must keep ingesting the nicotine merely "to function normally," RT 1921-22, 1924-25, and they experience severe and long-lasting withdrawal symptoms if they try to stop. RT 1925-28. Nicotine is particularly addictive when ingested in aerosol form via cigarette smoke, just as "smoking crack cocaine is the most addicting way [to] use cocaine." RT 1911-13. Nicotine is at least as addictive as heroin or alcohol. RT 1932-34.

About 70% of smokers would like to quit, and 35% make a serious effort to quit each year. RT 1946, 2029-30. But "very few succeed" in quitting — about 2.5% of smokers each year, RT 1946, typically only on their fourth or fifth attempt. RT 1922, 1926, 1928-29, 1946. Only half of smokers who make repeated quit attempts succeed. RT 1921-24, 2330-31. See also App. 152a.

#### **4. Philip Morris's Exploitation of Addiction in Designing Its Cigarettes**

For decades Philip Morris has been aware that smokers buy its cigarettes because they are addicted to the nicotine in them, and it has designed its cigarettes to make them more addictive. Philip Morris's fundamental business premise has long been that its product is nicotine, sold in its most addictive form.

As early as 1957, Philip Morris's R&D plan noted that the product "is really not the cigarette but smoke," which potentially could be regulated by the federal government as a drug. Ex. 17 at 1000304887. In 1959, its internal scientific documents listed "Addiction" as one reason people smoked. Ex. 226 at 1-2. Its scientists suggested taking advantage of this fact by redesigning the company's cigarettes to provide "*relatively high nicotine and low tar*," observing that "such a product is vital to our cigarette business." Ex. 1642 at 2.

In 1972, one of Philip Morris's top researchers on nicotine noted that "[s]moke is beyond question the most optimized vehicle of nicotine and the cigarette the most optimized dispenser of smoke," and thus, a "cigarette should be conceived not as a product but as a package. The product is nicotine." Ex. 3 at 5-6.

In 1980, Philip Morris's chief scientist, Thomas Osdene, informed the Board of Directors that research on nicotine was a "high priority" at the company because "the thing we sell most is nicotine." Ex. 148 at 1. For years Philip Morris studied the addictive effects of nicotine and of chemicals other than nicotine that might be added to cigarettes to maintain smokers' addiction

and make cigarettes even more addictive. *E.g.*, RT 1657-81, 1717-34, 1764-65; RT 1506-08, 1574-76, 1582-86. It focused on determining "the optimal nicotine/tar ratio" for its so-called "light" cigarettes. Ex. 148 at 5. This research assumed "that low tar cigarettes may need nicotine supplements to be rated acceptable." *Id.* at 6.

The point of the nicotine research program was not to determine whether nicotine is addictive. That "was never in doubt." RT 1745-46. When one of Philip Morris's top executives visited a Philip Morris laboratory and "saw the rats self-administering nicotine," and employees started explaining some of the research, the executive cut them off: "we all know it is addicting, it's addicting as hell." RT 1731-33.

"[E]ssentially functioning as a drug company," as one of its scientists described the operation, RT 1674, Philip Morris transformed the cigarette from "a natural product, rolled up and smoked," into a "sophisticatedly engineered product." RT 1810-11. By the early '80s it had "the scientific technology to remove all the nicotine from the product." RT 1701. Its engineers "could take out nicotine. They could add in nicotine. They could manipulate the levels of nicotine." RT 1701-02.

Philip Morris routinely manipulated the nicotine/tar ratio of its low-tar cigarettes, RT 1581-84, developing "many, many different kinds of manipulations," for example, by "adding chemicals . . . to help sweep out the nicotine" such as urea which, when burned, creates ammonia and helps release additional nicotine from the cigarette. RT 1583-86. In the 1970s, R.J. Reynolds, one of Philip Morris's competitors, concluded the success of the Marlboro brand during the 1960s and 1970s was due to Philip Morris's use of chemical manipulation to artificially boost the pH level of cigarette smoke and thereby release into the smoker's body "more free-base nicotine." RT 2331-33. *See also* App. 11a-12a.

None of this was disclosed to consumers or regulators. Philip Morris went to elaborate lengths to conceal from the outside world that it was manipulating

the nicotine level and hence addictiveness of its cigarettes. RT 1681, 1689-96, 1706-15, 1720-21. In 1980 a top Philip Morris scientist noted that although research on nicotine promised "significant scientific developments profoundly influencing the industry," it was "where our attorneys least want us to be." Fearing that "tacit acknowledgment that nicotine is a drug" could trigger FDA regulation, the attorneys "insist[ed] upon a clandestine effort in order to keep nicotine the drug in low profile." Ex. 423 at 1-2. *See also* RT 1962-66.

**5. Philip Morris's Exploitation of Addiction in Its Public Relations Strategy Focused on Creating Doubt in the Minds of Vulnerable, Addicted Smokers**

By the early 1950s, scientific proof had established that cigarettes were an important cause of lung cancer, and even the initial reports of these findings in the popular press had been enough to sharply depress cigarette sales. RT 2682-85; *see also* Ex. 295. One "indication of how serious the problem" was could be found in the fact that "salesmen in the industry [were] frantically alarmed and that the decline in tobacco stocks on the stock market exchange ha[d] caused grave concern . . . ." Ex. 295 at 4.

In response, Philip Morris launched a disinformation scheme to counter the threat to its business posed by this truthful information about cigarettes. On December 15, 1953, top executives of Philip Morris and other tobacco companies, acting as coconspirators, met in New York and set in motion "a public relations campaign which [was] positive in nature and [was] entirely 'pro-cigarettes.'" Ex. 295 at 2. According to an internal memorandum by the public relations firm hired for this task, from the beginning Philip Morris and the other companies envisioned that the campaign would be "a long-term, continuing program, since they feel that the problem is one of promoting cigarettes and protecting them from these and other attacks that may be expected